No. 82-5590

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ERNEST LEE MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

1. Petitioner's position is that a substantial federal question is presented by the refusal of the courts below to grant access to -- or even conduct an in camera inspection of -- the grand jury testimony of the prosecution's two eye-witnesses in a death penalty case. Petitioner prior to trial had asserted a need for this grand jury testimony in view of the importance of the witnesses and the prior exculpatory and inconsistent statements they had given. Since the State's case on both guilt and sentence of death depended on the trial testimony of these two

witnesses, the withholding of their grand jury testimony from the accused rises to significant Eighth Amendment dimensions.

The State's response nowhere denies this proposition. Rather, the State simply reiterates its generalized interest in grand jury secrecy and recites the incantation of the trial court that petitioner failed to lay "a sufficient predicate" (i.e., a sufficient showing of particular need) for access to this grand jury testimony.

Regarding grand jury secrecy, the State's reliance on Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) is plainly inapposite. Response at 7. None of the considerations cited in Douglas Oil -- protecting witnesses against intimidation, maintaining the integrity of grand jury proceedings, preventing prospective defendants from fleeing, and safeguarding the reputation of persons ultimately exonerated by the grand jury -- has any application once, as in this case, an indictment has been issued and the defendant has been taken securely into custody. Moreover, the courts below did not rely on any of the Douglas Oil considerations in denying access here.

Nor do the older cases cited by the State (Response at 8) diminish the importance of the issue raised. To the contrary, those cases were decided prior to recognition of a state's constitutional duty to turn over material evidence favorable to an accused upon proper demand, Brady v. Maryland, 373 U.S. 83 (1963), or of the considerations that ultimately gave rise to a right of access to grand jury testimony in

federal courts, see Jencks v. United States, 353 U.S. 657 (1957).

Finally, the State asserts that petitioner's motion for access to the grand jury transcripts was based on "pure surmise and speculation." Response at 9. Yet, the State admits that one of the two eyewitnesses in question changed her story prior to trial (Response at 4) and does not deny that both eyewitnesses had given inconsistent and exculpatory statements before the motion for access to the grand jury transcripts was filed. The State's own rather disjointed statement of facts underscores the uncertainty as to what actually happened in this case. In these circumstances, the Eighth Amendment and basic principles of due process preclude a conviction and death sentence based on such testimony, where the accused has been denied relevant transcripts with which to challenge that testimony.

2. Contrary to respondent's assertion, the Florida Supreme Court considered and decided the issue of whether the United States Constitution requires equalized death sentences for petitioner and his co-defendant. In overriding the recommendation of life by petitioner's jury to achieve "consistency" with the co-defendant's death sentence, the trial court noted that "[t]he United States Supreme Court has determined that if the death penalty is to be imposed by the states, the United States Constitution demands that it be imposed with regularity, rationality and consistency." Petition at App. 24a. The Florida Supreme Court affirmed the sentence of death, expressly approving the trial court's decision to override the jury recommendation

of life in light of the "constitutional demand that the death penalty be imposed in a regular, rational, consistent manner." Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982); Petition at App. 2a. By upholding the trial court's imposition of the death penalty as constitutionally demanded to avoid an unwarranted disparity in sentences, the Florida Supreme Court passed on petitioner's federal constitutional claim.[1/] Nothing more is required for this Court's exercise of its jurisdiction. Jenkins v. Georgia, 418 U.S. 153, 157 (1974); Raley v. Ohio, 360 U.S. 423, 436 (1959); Manhattan Life Insurance Co. v. Cohen, 234 U.S. 123, 134 (1914). Beyond this, the State does not dispute that the issue itself is worthy of certiorari.[2/]

3. The State asserts that petitioner failed to preserve his objection to the trial court's exclusion of mitigating testimony on rehabilitative capacity. Response at 13-14. The short answer to this contention is that the Supreme Court of Florida addressed the merits of this claim without relying on, or even mentioning, any such alleged

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1/ In Barclay v. Florida, No. 81-6908, cert. granted 51 U.S.L.W. 3362 (November 8, 1982) this Court will consider whether, in the absence of any mitigating circumstance, a trial judge's override of a jury recommendation of life may be sustained even though one or more aggravating circumstances may be invalid. In petitioner's case, this Court is asked to decide whether, in the presence of a statutory mitigating circumstance, the trial court may rely upon an additional nonstatutory factor (consistency with the sentence of a co-defendant) to override a jury recommendation of life.

2/ The State incorrectly asserts that petitioner misstated the number of aggravating circumstances the trial court found to apply. As set forth in the petition for writ of certiorari, and as supported by the record, the trial court found that the two aggravating circumstances blended into one and, accordingly, should be treated as one. Petition at 9 and at App. 11a-12a, 20a-21a.

procedural defect. 415 So.2d at 1263; Petition at App. 2a. As long as it is clear that the state supreme court reached and decided a federal question, this Court does not inquire into precisely how that federal question was raised below. See, e.g., Jenkins v. Georgia, 418 U.S. 153, 157 (1974); Raley v. Ohio, 360 U.S. 423, 436 (1959); Manhattan Life Insurance Co. v. Cohen, 234 U.S. 123, 134 (1914). Therefore, this issue is properly presented.[3/]

4. The State finally contends that petitioner did not sufficiently raise below his challenge here to the Florida procedure, as applied in petitioner's case, of overriding jury recommendations of life imprisonment in capital cases. Yet, the Florida Supreme Court did rule on the question of the constitutionality of the Florida jury override procedure as applied to this particular case. In a section of the appellate brief entitled "The Court Erred in Overruling the Jury's Advisory Sentence of Life Imprisonment," petitioner's counsel below at least touched on the issue that the rejection of the jury recommendation of life in the presence of mitigating circumstances did not in this case comport with the Constitution. Appellant's Brief at 48, citing Gardner v. Florida, 430 U.S. 349 (1977). More to the point, the Florida Supreme Court expressly upheld the jury override, while finding that a death sentence was constitutionally

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3/ Even if petitioner arguably failed to comply with the Florida requirements for preserving his objection, it is clear that state procedural rules may not operate in derogation of petitioner's due process rights under the Eighth and Fourteenth Amendments. See Green v. Georgia, 442 U.S. 95 (1979)(per curiam); Chambers v. Mississippi, 410 U.S. 284, 295-98 (1973).

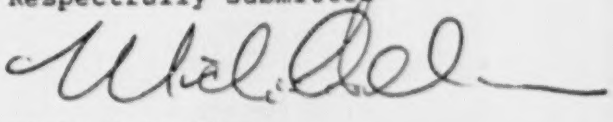
demanded to insure consistent imposition of the death penalty. 415 So.2d at 1263; Petition at App. 2a. In so doing, the court cited past cases in which it had upheld the constitutionality of Florida's jury override procedure. 415 So.2d at 1264; Petition at App. 3a.

As recently reiterated, this Court has broad discretion to interpret the scope of the state decision below in reviewing the imposition of a death penalty. Eddings v. Oklahoma, 455 U.S. 104, 114 n.9 (1982) ("Our jurisdiction does not depend on citation to book and verse."). This is particularly germane where the state court has repeatedly reaffirmed the death sentencing procedure at issue. In any event, the holding of the Florida Supreme Court in response to petitioner's challenge below to the jury override sufficiently provides this Court with jurisdiction.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Florida.

Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 1982, a copy of this Reply Brief On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Florida was mailed, postage prepaid, to Michael J. Kotler, Assistant Attorney General of the State of Florida, Park Trammel Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

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